Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Modification of Section 90.267(b)	)	RM-_____
and Other Provisions of the FCC's	)	
Regulations Affecting the Ownership	)	
of Specialized Mobile Radio (SMR)	)	
Systems Within 40 Miles of Each Other	)	

To: The Commission

PETITION FOR RULE MAKING

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May 26, 1992

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Summary

A & B Electronics, Inc. ("A & B"), one of the major providers of Specialized Mobile Radio ("SMR") service in the southwestern United States, hereby petitions the Federal Communications Commission to initiate a rule making proceeding designed to substantially modify the existing regulations which limit the number of channels SMR operators can accumulate in a geographic area. These rules are an impediment to the growth of SMR service. They limit the ability to implement larger, more efficient trunked systems, inhibit the growth of wide area SMR service, and stifle entrepreneurs' ability to offer interconnect service.

As a result, A & B has proposed two additions to current rule section 90.627(b) which would permit the aggregation of mature SMR systems and the institution of a system license. In addition, A & B proposes the modification of existing rule section 90.627(b)(2) to reflect the Commission's acceptance of the aggregate loading concept. A & B's proposals would ameliorate the negative effects of the current 40-mile regulations, while protecting against spectrum hoarding or warehousing.

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A & B Electronics, Inc. ("A & B") pursuant to §1.401 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission")[1/] hereby requests that the Commission initiate a Rule Making Proceeding to modify § 90.627 and other provisions of the rules which limit the number of frequency assignments which may be authorized to Specialized Mobile Radio ("SMR") licenses in a geographic area.[2/] These regulations have seriously inhibited the growth of the SMR industry and hampered the provision of service to the public. Moreover, the preservation of the regulations which constitute the so called "40 mile rule" will delay the introduction of advanced technologies in the SMR service by reducing the likelihood that entities can accumulate the number of channels necessary to offer a competitive mobile telecommunications capability.

1/ 47 C.F.R. §1.401(a).

2/ A & B's proposals only extend to trunked SMR systems.

I. Introduction

A & B Electronics, Inc., a wholly-owned subsidiary of Pittencrieff Communications, Inc. is one of the largest providers of SMR service in the southwestern U.S., with coverage in Texas, New Mexico, Oklahoma, Colorado, Utah and Arizona. As of April, 1992, A & B was operating over 500 SMR channels, with radio service shops in 22 separate locations in six states. The company has monthly gross revenues of approximately $1 million. Although A & B's facilities are located in rural areas and small cities such as Midland/Odessa, Abilene, Wichita Falls, San Angelo, and Lubbock, Texas, it also provides service to larger cities, such as Austin, San Antonio, El Paso and Albuquerque. A & B's primary focus is on SMR traffic; however, it is a full service communications company offering paging, tower services, telemetry engineering and sales. A & B employs nearly 150 employees to operate its SMR and other communications facilities.

A & B has been successful in providing SMR service to thousands of customers throughout its coverage area. However, its efforts to offer seamless coverage have been thwarted by the provisions of, among others, § 90.627 of the FCC's Rules and Regulations. That section of the rules states that licensees cannot be authorized an additional trunked system within 40 miles of an existing trunked system except where the licensee's existing trunked system is loaded to at least 70 mobile and control stations per channel.[3/] In addition to limiting the opportunities for offering wide area SMR service,

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[3/] Section 90.627(b) also states that the 40 mile rule is inapplicable for single entity systems (90.627(b)(1)) and licensees holding authorizations in the same location for 800 and 900 MHz systems (90.627(b)(3)).

the 40 mile rule inhibits the consolidation of SMR systems and thereby reduces the ability to realize economic and spectral efficiencies through the operation of larger systems. Finally, the 40 mile rule inhibits the provision of interconnected service, particularly in rural areas, where there is sufficient spectrum but, where interconnected operations produce fully loaded channels at levels significantly lower than 70 units per frequency. Accordingly, A & B asks that the Commission modify the 40 mile rule in the fashion described below.

II. The 40 Mile Rule Is An Impediment To The Growth of the SMR Service

The 40 mile rule was adopted in order to minimize the likelihood of a single licensee dominating a particular market and to reduce the probabilities that frequencies would be assigned but not used.[4/] It has been over 15 years since the Commission established the SMR service. It has also been nearly 10 years since the Commission released the last of the spectrum available for use by SMR systems in the 800 MHz bands. Accordingly, it is now appropriate to reevaluate the Commission's concerns regarding a single licensee dominating a particular market and the probabilities that frequencies would be assigned but not used. Moreover, the 10 years since the release of the remaining 800 MHz spectrum have produced an environment in which the 40 mile rule serves as a hinderance to the provision of SMR service and, consequently, impairs

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4/ Report and Order, Docket No. 81-787, FCC 83-395, released September 23, 1983. See also, Second Report and Order, PR Docket No. 79-191, FCC 82-338, 90 FCC 2d 1281 (1982).

the public's ability to receive the best possible service options from SMR entrepreneurs. All of these factors militate in favor of the modification of the 40 mile rule.

In many major metropolitan areas, the 40 mile rule has not been a serious impediment to the consolidation of SMR systems and, therefore, has not prevented the provision of spectrally and economically efficient SMR services to end users. In these locations, the systems, at least on an aggregate level, are often loaded to greater than 70 units per channel. Because the Commission has at least implicitly recognized the aggregate loading concept in its decision permitting the construction of an enhanced SMR network ("ESMR")[5/] major market consolidation has occurred, allowing the greater efficiencies the Commission has recognized in the provision of SMR service with multiple channels.[6/7/]

Outside of the top metropolitan areas, however, the 40 mile rule has limited consolidation in the SMR industry and thereby prevented the efficiencies that end users can recognize in the provision of service by larger trunked systems. The 40 mile rule has also reduced the opportunity for SMR entrepreneurs to accumulate the spectrum necessary to justify the expenditures inherent in the conversion to more efficient digital

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5/ In re Request of Fleet Call, Inc. for Waiver and other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, 6 FCC Rcd 1533 (1991) ("Fleet Call MO&O"), recon. den. 6 FCC Rcd 6989 (1991).

6/ The FCC has recognized the efficiencies of authorizing a significant block of spectrum to a single user: "... we also want to assign frequencies in a manner which allows them to be used by a large number of users in the most spectrally efficient way" Report and Order, PR Docket No. 85-6, 50 Fed. Reg. 32419 (August 12, 1985).

7/ A & B specifically recommends modification of § 90.627(b)(2) to reflect the aggregate loading concept. See infra, p 11.

technology. For example, in San Antonio, Texas, there are many SMR authorizations that were issued prior to 1987 and before that city was included on the Commission's waiting list. Accordingly, those licensees no longer are required to meet the Commission's loading standards.[8/] Accordingly, these systems, while they may operate independently, without fear of channel recovery, may not combine their operations, because of the 40 mile rule. This same situation exists in dozens of locations throughout the United States, where there are multiple authorized facilities that either no longer are required to meet loading standards, or will likely not have to meet loading standards in the future, but which cannot combine their facilities in order to produce larger, more efficient trunked systems. This impediment is directly contrary to the Commission's stated intent to permit the authorization of larger, more efficient trunked systems; defeats the economics of scale that may be recognized with the consolidation of multiple systems that are loaded to less than 70 units per channel; and reduces the possibility that sufficient channels can be accumulated to justify the cost of implementing digital technology.

A second problem created by the 40 mile rule is the limitation of the potential provision of wide area service by SMR systems. At least in rural areas, the Commission is already considering a Petition for Rule Making submitted by the American SMR Network Association (ASNA) requesting that the FCC amend its rules to allow rural 800

8/ Only SMR licenses initially issued between June 1, 1988 and June 1, 1993 in areas where there was a waiting list at the time of their five year license renewal, are required to meet the loading standards. Report and Order, PR Docket No. 86-404, FCC 88-69, 3 FCC Rcd 1838 (1988) at n. 91.

MHz SMR operators to split their channels at multiple sites to provide a greater area of service.[9/] The provision of wide area SMR service has been recognized by the Commission as a significant trend for the industry.[10/] The Commission found that

> "authorizing SMR licensees the use of frequencies for multiple station systems providing coverage to wide areas, either nationally or regionally, would increase spectrum efficiency, provide better quality service to end users, and allow service to reach potential end users that may otherwise be without adequate communication options. Wide area licensing should promote further improvements in spectrum efficient technologies by providing incentives to SMR operators to develop systems for end users with substantial land mobile requirements, but without the resources to construct their own systems. Wide area licensing would grant the high degree of flexibility, both geographically and operationally, necessary to construct such systems."[11/]

The 40 mile rule acts to inhibit the provision of wide area service by limiting an entrepreneur's ability to construct facilities in an adjacent community without having first reached the requisite loading level for its initial system. As noted above, systems in some of the top urban locations may be able to meet the loading requirements on an aggregate basis, which would alleviate concerns raised by the 40 mile rules. However, in all but these top metropolitan areas, the 40 mile regulations thwart the implementation of wide area and regional systems.

A final impediment to better SMR service caused by the 40 mile rule is the lack of an entrepreneur's ability to acquire additional channels to provide interconnected

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9/ RM 6724, filed March 27, 1989.

10/ Notice of Proposed Rulemaking, PR Docket No. 89-553, 4 FCC Rcd 8673 (1989).

11/ *Id.* at ¶ 16.

service in markets where dispatch communications are not prevalent. It is widely recognized that, particularly outside of the top metropolitan areas, SMR service consists of a high percentage of interconnect traffic. Following this industry practice, A & B provides a significant proportion of its customers with interconnect service. A study by Economic and Management Consultants International, Inc. (EMCI) confirms this trend. It found that SMR entrepreneurs providing service to fewer than 500 transmitter units, operating with 25% or fewer of those units in metropolitan areas were characterized by almost 50% interconnect traffic.[12/]

However, as the Commission has recognized, loading and channel accumulation regulations impede the development of interconnected systems. The Commission has noted that "interconnection usually leads to messages longer in length than traditional dispatch communications. Because our loading standards are based on dispatch communications, systems that offer interconnection are often disadvantaged because they cannot meet the necessary loading requirements."[13/] Accordingly, while a five channel system providing primarily dispatch service might be considered fully loaded with 350 customers (five channels at 70 units per channel), a system offering primarily interconnected service might only be able to support half that number of customers. An SMR which is fully utilizing its frequency assignments by having a system actively employed by interconnected customers would nevertheless be unable to secure additional

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12/ AMTA/EMCI SMR Industry Survey, August 1991 at p. 89.

13/ Notice of Proposed Rulemaking, PR Docket No. 86-404, FCC 86-447, 1 FCC Rcd 809 (1986).

frequency assignments because it could not meet the requirements of the 40 mile rule. Accordingly, in a location such as Wichita Falls, Texas, where there is substantial channel capacity, A & B may be prohibited from securing additional frequency assignments even though it is already utilizing its existing channels intensely, albeit with interconnect traffic.[14/]

This limited ability to provide interconnected service is contrary to the Commission's vision of the SMR industry. The Commission has stated "we have encouraged the provision of interconnection, and other service options."[15/] In its decision combining former subparts M and S of Part 90, the Commission recognized that SMRs should be capable of providing interconnect, as well as dispatch services. At least with respect to rural SMRs, the Commission found that they "have a unique opportunity to offer a range of specialized mobile communications services on larger systems."[16/] However, despite the Commission's desire to allow SMRs to offer interconnect service, to the extent economically justifiable, the rules have prohibited this type of service. Modification of the 40 mile regulation is, therefore, appropriate to achieve the Commission's goals and to reflect marketplace realities.

[14/] To date, an SMR's decision to offer interconnect services has been largely economic; in locations characterized by severe spectrum shortages, the significant proportion of channel traffic is dispatch. A & B's recommendations would do nothing to alter those basic economic considerations.

[15/] Notice of Proposed Rulemaking, PR Docket No. 86-404, FCC 86-447, 1 FCC Rcd 809 (1986).

[16/] Report and Order, PR Docket No. 86-404, FCC 88-69, 3 FCC Rcd 1838 (1988).

III. Summary of A & B's Proposals

In order to eliminate the restrictions of the 40 mile rule, without leading to spectrum hoarding or speculation in unbuilt systems, A & B proposes two additions to the existing regulations. First, it recommends the creation of a new § 90.627(b)(4) which would allow an existing station licensee to secure FCC approval for assignment of an authorization even if both stations, located within 40 miles of each other, are loaded to fewer than 70 units per channel. The new rule section would permit assignments of this nature if both stations were no longer within their original license term. This proposal specifically presumes that the affected licensees either met the applicable loading standards at the time of their five year license renewal, or were not required to do so, because the station location was not considered to be an urban or a wait listed area at the five year license anniversary date.

Second, A & B proposes the addition of a new § 90.627(b)(5), which would eliminate the 40 mile restriction altogether for any licensee that had met the requirements for, and had been designated, a system licensee. A system license could be obtained by any entity which accumulated 20 or more constructed channels within a metropolitan service area (MSA) or rural service area (RSA) as defined by the Commission.[17/] The stations comprising the license could either be beyond their five year initial license term, or be able to demonstrate aggregate loading of 70 units per

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17/ Public Notice, FCC Report No. 92-40, FCC Document No. 21538, released January 24, 1992.

channel over the system.[18/] The stations would be eligible for inclusion in a system license through original licensees as well as those who have secured the authorization by assignment. Accordingly, a system licensee would be excused from the 40 mile rule even if it were a new entrant to the market, so long as it acquired either fully loaded systems, or those that had been authorized for greater than five years.

Once an applicant met the system license criteria, it could request an authorization which would specify the channels authorized and the locations where the frequencies are actually constructed. A licensee would still only receive co-channel protection based upon the locations where the channels were in use. The licensee would thereafter be able to request additional channels, either from the FCC or by assignment (regardless of how long the target station had been licensed), at any location in the designated MSA or RSA. A & B would, however, only allow a system licensee to increase its system capacity by five more channels than it has constructed within 40 miles. A licensee could also not request additional channels through intercategory sharing unless all SMR channels were licensed throughout the system area. A system licensee would be required to construct any additional channels obtained from the Commission within 8 months. Any channels obtained through assignment, would already be constructed.[19/]

[18/] These two criteria mirror the proposed methods by which channels may be accumulated at sites within 40 miles of each other.

[19/] 47 C.F.R. § 90.609.

Finally, A & B recommends modification of existing rule section 90.627(b)(2), so that a licensee could be authorized an additional trunked system within 40 miles of an existing system in instances where all of the licensee's channels within 40 miles of the target facility are loaded to at least 70 mobile and control stations, on an aggregate basis. This change is suggested to conform to the Commission's apparent decision in the Fleet Call MO&O to accept aggregate loading to satisfy the 40 mile rule standard.

IV. A & B's Proposals Would Ameliorate The Negative Effects of the Current 40 Mile Rule

The first proposed modification of the 40 mile rule would produce several positive results. It would promote the growth of larger, consolidated systems, recognized by the Commission as more spectrally efficient and, because of economies of scale, more financially viable. By fostering consolidation, A & B's proposals would increase the likelihood of licensees implementing digital technology, recognized to be even more spectrally efficient than current analog transmissions. Finally, the newly proposed § 90.627(b)(4) would eliminate the need for management contracts for systems that have been licensed for five years or more. Although the Commission has tacitly approved the use of management contracts,[20/] their employment is cumbersome. Moreover, in many locations, such agreements have been too costly for smaller operators. A & B's recommended § 90.627(b)(4) would discourage participation by speculators by limiting the opportunities for accumulation of unloaded channels until after the expiration of the

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20/ Applications of Motorola, Inc. (July 30, 1985) announced by FCC News Release No. 6440 (August 15, 1985).

initial license term, unless the acquiring licensee had already qualified for a system license or the target licensee had already met its loading requirements.

The system license proposal would meet the Commission's desire to promote wide area systems by allowing multiple sites licensed to the same entity within 40 miles. Once it had met the minimum requirements, a system licensee would be able to provide wide area coverage. This proposal would also permit licensees to secure sufficient frequencies to provide an acceptable grade of interconnect service, when business conditions dictate an emphasis on that type of service. Accordingly, A & B's proposals will help to reduce the three significant negative effects of the 40 mile rule: 1) its impediment to the consolidation of underloaded, but mature facilities; 2) the provision of wide area service; and 3) fostering interconnected communications where it is economically warranted.

V. A & B's Proposal Is Superior To The Complete Elimination of the 40 Mile Rule

The Commission has stated that elimination of the 40 mile rule could encourage speculators to apply for SMR frequencies and could encourage hoarding and warehousing of SMR channels.[21/] However, A & B's proposal would avoid spectrum hoarding for several reasons. First, underloaded frequencies could only be consolidated if they have been constructed, and operational, for a period of five years or more. Second, those desiring to consolidate through acquisition would not be discouraged from acquiring recently authorized underloaded systems, so long as the acquiring entity

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21/ Notice of Proposed Rulemaking, PR Docket No. 89-553, FCC 89-328, 4 FCC Rcd 8673 (1989).

already met the system license criteria. Third, an entity who met the system license criteria and wished to hoard channels above the 20 channels that had already been demonstrated to be either loaded or authorized for greater than five years, by obtaining additional frequencies from the Commission could only do so five channels at a time, and would be required to undertake the capital commitment necessary to build additional facilities before the next five channels were requested.

A & B's recommendations are superior to suggestions that the Commission completely eliminate the 40 mile rule and simply retain existing, or impose more stringent, construction standards. This latter proposal would still permit a well financed speculator to accumulate and build facilities, while extending no effort to provide service to the public. A & B envisions that such speculators may simply wish to hold the constructed frequencies, believing that ultimately they would, grouped together, produce a significant resale value. A & B's proposal would require system licensees, who might be able to hoard channels, to at least initially demonstrate that they have been able to build, operate and retain SMR systems for five years or that they have successfully loaded facilities. A & B submits that there is considerably less danger in a system licensee, who has met these criteria, hoarding spectrum than there is for a speculator who has not been able to meet the proposed standards.

A & B's proposal will promote the more rapid utilization of SMR channels, where they are not fully employed today. However, it will allow existing systems the opportunity to be the providers of SMR service if they are willing to make the investment to do so. New entrants can take advantage of the regulations, but only by

first acquiring systems that have been in operation for five years or more. There would be no opportunity for a speculator to simply amass channels, unless they were willing to license four, five-channel systems, each 40 miles apart within an RSA or MSA, and wait the five years necessary to qualify for a system license.

VI. Effect on Existing Regulations

A & B has considered the effect that its proposals might have on the Commission's existing regulations. It is particularly cognizant of the rules which provide that, beginning with systems authorized after June 1, 1993, the Commission will not enforce its loading requirements for purposes of recovering channels. However, those regulations will still be used to determine if licensees are entitled to receive additional frequency assignments. The following, therefore, is a review of the relevant rule provisions where the 40 mile regulation and loading requirements might otherwise apply.[22/]

> 90.607(c)(1) - This rule provision requires that an applicant for a trunked system furnish a list of all radio stations licensed within 40 miles of its proposed facilities. A & B proposes the retention of this requirement. Applicants who have satisfied the system license requirements would be able to submit a copy of their system authorization to indicate that they are eligible for additional frequency assignments even if they have unloaded system within 40 miles of the proposed facility.
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> 90.609(c) - This section of the regulations permits partial assignments of constructed systems. A & B proposes that partial assignments be permitted to system licensees. A & B does not believe any modification of this rule

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22/ The following rule sections are not a complete list of regulations governing either the 40 mile rule or the loading requirements for SMR systems. Instead, they are a listing of those regulations which directly affect the accumulation of additional frequency assignments.

section is necessary to allow the partial assignment of mature systems (licensed for greater than five years) to an entity attempting to establish a system license.

90.611(d) - This regulation establishes a waiting list for 800 MHz facilities. A & B proposes that applicants establishing a system license be permitted in the first group of entities, comprised of those licensees in an area which operate trunked systems with 70 or more mobile units per channel. A & B believes that in addition to loaded systems, those entities acquiring sufficient spectrum of mature licensees should also be accorded the preference for the priority portion of the waiting list. A & B expects, however, that as the Commission phases out its enforcement of the loading requirements, there will be limited instances for the use of the waiting list.

90.621(g) - These regulations provide for the intercategory sharing of 800 Mhz frequency assignments. A & B proposes that intercategory channels be available for SMR system licenses, only when there are no available SMR channels for licensing from the Commission within the relevant MSA or RSA. SMR frequency assignments would still be available for non-SMR applicants when those applicants include a statement from their frequency coordinator verifying that there are no available channels in the applicant's service category.

90.627 - This rule section is the basis for the current 40 mile rule. A & B has attached, as Appendix A, proposed revision of the regulations to add new sections 90.627(b)(4) and (5) and a modified section 90.627(b)(2). These new regulations would cover the inapplicability of the 40 mile rule in instances where an applicant wishes to: 1) acquire aggregately loaded or mature SMR systems; or 2) establish a system license. It would also acknowledge the seemingly adopted aggregate loading concept.

90.631 - These provisions govern trunked systems loading, construction and authorization requirements. A & B proposes that the new regulations for the 40 mile rule become effective on June 1, 1993. Accordingly, applicants for system licenses would not be subject to the requirements of 90.631(b). A & B recommends modification of § 90.631(c) so that applicants seeking to expand trunked systems through assignment could do so even if the existing and target licensee are loaded to less than 70 mobiles per channel, if both systems were not within their original license terms. Further, that rule section would be amended to specifically exempt, by its terms, system licensees. A & B recommends the retention of § 90.631(d) for rural licensees who are either unable to or do not wish to take advantage of the system license opportunity. Section 90.631(e) would require modification

to state that system licensees must complete construction within eight months. A similar modification would be required for § 90.631(f).

VII. Conclusions

A & B Electronics, Inc. hereby proposes modification of the Commission's regulations which otherwise prohibit the authorization of unloaded trunked SMR facilities within 40 miles of another such system. The retention of these regulations limit the opportunity for consolidation of SMR systems, thereby denying end users the benefits of spectrally efficient larger SMR facilities and the potential for the swifter introduction of digital technology that might be available from entities with a significant number of SMR frequencies in a market. The 40 mile rule also inhibits the provision of wide area SMR service and interconnected service, both of which have been recognized by the Commission as important in the SMR service. In order to rectify this problem, A & B has proposed two primary modifications to the regulations, although conforming changes would also be necessary. First, it recommends that the regulations be amended to permit the accumulation of channels not only when there would be no resulting loading requirement allocation, but also when the target authorizations are no longer within their initial license term. Second, A & B would permit authorization of a system license covering an MSA or RSA, once either 20 loaded channels or 20 mature channels were accumulated within the target area. A & B submits that these rule changes would promote expansion of the SMR industry and result in better service to end users. A & B believes that its proposal is superior to a recommendation to completely eliminate the 40 mile rule, which would result in the potential hoarding of SMR spectrum by speculators.

WHEREFORE, THE PREMISES CONSIDERED, A & B Electronics, Inc., hereby respectfully submits the foregoing Petition for Rulemaking and requests that the Federal Communications Commission adopt a Notice of Proposed Rule Making consistent with the recommendations contained herein.

Respectfully submitted,

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APPENDIX A

Proposed Rule Section 90.627(b)(4)

Both the licensee's existing trunked system(s) and the additional trunked system are no longer within their original five year license term.

Proposed Rule Section 90.627(b)(5)

The licensee has qualified for a system license. For purposes of this section, a system licensee is one which is licensed for 20 or more constructed channels within a Metropolitan Service Area (MSA) or Rural Service Area (RSA). Once qualified as a system licensee, an entity may request the authorization of additional channels at any location within the designated RSA or MSA. However, a system licensee may not increase its system by more than five channels than it has constructed within 40 miles.

Revised Rule Section 90.627(b)(2)

All of the licensee's existing trunked channels within 40 miles of the target facility are loaded to at least 70 mobile units and control stations, on an aggregate basis.